No. 11,910

In The

United States Circuit Court of Appeals For the Ninth Circuit

JOSEPH CECIL MCKINNEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWERING BRIEF

MILES N. PIKE
UNITED STATES ATTORNEY
BRUCE R. THOMPSON
WM. J. KANE
ASSISTANT UNITED STATES ATTORNEYS
FEDERAL BUILDING
RENO, NEVADA
Attorneys for Appellee

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JURISDICTION

The judgment of the United States District Court for the District of Nevada was entered on October 3, 1947 (T. R. 52-55) under which the defendant was committed to the custody of the Attorney General for five years on each of the two counts, said terms to run concurrently, and fined One Dollar ($1.00) on each count.

From this judgment the defendant appeals for a review of the judgment under Sec. 225, U. S. C. A. Title 28.

QUESTIONS PRESENTED FOR REVIEW UPON APPEAL

The appellant has designated thirteen alleged errors under Specification of Errors, on pages 6-8 of Appellant's Opening Brief, but on page 8 thereof for the purpose of argument confines himself to two issues only. We shall address our reply to the alleged errors in the Specification of Errors.

ARGUMENT

1 and 2

The Information Was Fatally Defective In That It Omitted a Material Obligation.

Conviction Based on Information Was Improper.

As the specified errors Nos. 1 and 2 are so closely related we shall consider them together. The Information (T. R. 3 and 4) consists of two counts charging violations of Sec. 265 T. 18, U. S. C. A. The Information was filed on July 30, 1947 and arraignment took place in the United States District Court for the District of Nevada on the same date (T. R. 48) after the appellant had in open Court signed a Waiver of Indictment (T. R. 49) under Rule 7(b) Federal Rules of Criminal Procedure, Sec. 687, T. 18, U. S. C. A. At the time of arraignment appellant was informed of his right to have counsel and the right to have his case presented to a Grand Jury. He was found to be fully cognizant of his rights and of the legal procedure involved, but declined to have an attorney and willingly signed the Waiver of Indictment before the Information was filed. Under Rule 7(a), Federal Rules of Criminal Procedure: "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information." The offense for which appellant was prosecuted was punishable by a fine of not more than $5000 and imprisonment of not more than fifteen years. Sec. 265 T. 18, U. S. C. A. The prosecution by information was in full compliance

with said Rule 7 of the Federal Rules of Criminal Procedure.

The second attack upon the information is that it did not state the appellant had knowledge of the altered condition of the obligations of the United States found in his possession. Both counts charge offenses in the language of the section violated and contain all the essential elements of the offenses with such definite clarity that the appellant was fully apprised of the charges he was called upon to meet and protected against future prosecution for the same offenses. Rule 7(c) Federal Rules Criminal Procedure requires: "The information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The knowledge on the part of appellant that the Federal Reserve Notes in question were altered is one of proof upon the part of the government which was done in this case to the satisfaction of the jury.

The appellant relies upon the case of *United States* v. *Carll,* 105 U. S. 611; 26 L. Ed. 1135, (p. 9, Appellant's Opening Brief) that the information must allege he had knowledge of the alteration of the notes. That case was decided in 1882 and the statute under consideration was similar to the common law offense of uttering a forged or counterfeit bill. The offenses in the instant case are statutory and are governed by the well-established law that an indictment or information need not allege knowledge upon the part of the person charged where such offense is statutory and such knowledge is not made an element of the offense. In *United States* v. *Balint, et al,*

258 U. S. 251, Mr. Chief Justice Taft in the delivery of said opinion stated,

> "While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it (*Reg.* v. *Sleep,* 8 Cox C. C. 472), there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se. *Commonwealth* v. *Mixer,* 207 Mass. 141; *Commonwealth* v. *Smith,* 166 Mass. 370; *Commonwealth* v. *Hallett,* 103 Mass. 452; *People* v. *Kibler,* 106 N. Y. 321; *State* v. *Kinkead,* 57 Conn. 173; *McCutcheon* v. *People,* 69 Ill. 601; *State* v. *Thompson,* 74 Ia. 119; *United States* v. *Leathers,* 6 Sawy. 17; *United States* v. *Thompson,* 12 Fed. 245; *United States* v. *Mayfield,* 177 Fed. 765; *United States* v. *36 Bottles of Gin,* 210 Fed. 271; *Feeley* v. *United States,* 236 Fed. 903; *Voves* v. *United States,* 249 Fed. 191."

We further rely upon the law as set forth in *United*

States v. *Behrman,* 258 U. S. 288, paragraph 2, which states:

> "It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in bar of further prosecution for the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent. *United States* v. *Smith,* 2 Mason 143; *United States* v. *Miller,* Fed. Cas. 15,775; *United States* v. *Jacoby,* Fed. Cas. 15,462; *United States* v. *Ulrici,* Fed. Cas. 16,594, (Opinion by Miller, Circuit Justice); *United States* v. *Bayaud,* 16 Fed. 376,383-4; *United States* v. *Jackson,* 25 Fed. 548, 550; *United States* v. *Guthrie,* 171 Fed. 528, 531; *United States* v. *Balint,* ante, 250."

An application of the law set forth in the two cases next above cited was made in the case of *United States* v. *Combs, et al,* 73 Fed. Supp. 813 by the United States District Court, Eastern District, Kentucky, on October 7, 1947, in a case parallel in legal principles to the one at bar in which that court overruled the defendant's motion to dismiss the indictment.

The trial court instructed the jury in Instruction No. 12, (T. R. 37) in an adequate and comprehensive manner upon the matter of knowledge and intent. A part of said instruction is as follows: "The jury must find beyond a reasonable doubt that the defendant kept such described altered security in his possession with knowledge of its character and with intent to defraud."

The question of the sufficiency of the information is

raised for the first time on this appeal. The first step in laying a foundation for an appeal, if it is apparent that the information does not state a cause of action, is to challenge the same by a proper motion in the trial court. The Transcript of Record fails to show any motion before the judgment attacking the sufficiency of the information, on any ground, nor does it show any motion in arrest of judgment under Rule 34, Federal Rules of Criminal Procedure, 18 U. S. C. A. 687 et seq. or for a correction or reduction of sentence under Rule 35, Federal Rules of Criminal Procedure, 18 U. S. C. A. 687 et seq.

We believe the information was sufficient without alleging knowledge upon the part of the defendant that the Federal Reserve notes were altered; that prosecution by information was proper and that the conviction thereunder was justified and did not violate in any manner the rights of the defendant.

The "intent to defraud" is a comprehensive term and includes knowledge upon the part of the possessor of the character of the split notes which come under the terms of the statute involved as altered notes. We submit that it is difficult to conceive a situation where knowledge would not be part of a fraudulent intent.

3

The Verdict Was Not Supported by the Evidence.

The trial record shows, and it is admitted by appellant, that he was found by the police officers to have in his possession one fifty dollar and one twenty dollar

Federal Reserve note, both of which were split in like manner, the front of each note being attached to a piece of celluloid and the back of each note also attached to celluloid and at the time of his arrest he was found to be in possession of one thousand new one dollar bills. The appellant claims he obtained the split bills and new bills from the home of a former friend and business associate, one George Harris, (Tr. T. 147, 154-156) and that he intended "setting a trap" (page 147) for Harris, "to keep him quiet" so that he could recover ten thousand dollars allegedly stolen by Harris from the appellant. On cross examination he stated he got those "thousand singles out of the bank" by exchange for hundred dollar bills (Tr. T. 152). Appellant testified (Tr. T. 147) that he got the split notes and the thousand new bills from George Harris's place the evening Mr. and Mrs. Haines drove him there. Mrs. Haines denied, on cross examination, that she saw him place any box in their car (Tr. T. 49). This took place on July 25, 1947 (Tr. T. 41). Appellant in his testimony refers to his ten thousand dollars whereas he claims eight thousand of this amount was entrusted to him by his landlady, Marian Jardine, (Tr. T. 141). The testimony of Mr. and Mrs. Haines and appellant shows that appellant took approximately sixteen hundred dollars from the Haines home in Los Angeles, California, on July 26, 1947. There was an understanding between Mrs. Haines and appellant that she would loan him this sum, but it was taken without her knowledge.

Appellant was arrested by the police in Reno, Nevada on July 28, 1947. The appellant was not charged with the

making of counterfeit bills nor with altering the two split bills. All the bills found in his possession were genuine obligations of the United States, including the split bills. He contends his possession of the split bills and the thousand new one dollar bills was for the purpose of forcing George Harris to return ten thousand dollars allegedly stolen from him. There was no proof offered by him of the truth of his having possessed such a sum of money so stolen by Harris. The record is silent of any request to have the landlady, Marian Jardine, appear in support of his contention although he testified she gave him eight thousand of the ten thousand dollars. We contend it would strain the credulity of any reasonable person to believe such a story and submit this to be a novel way to effect the collection of moneys unjustly taken from another. The evidence overwhelmingly supported the charge and justified the verdict.

4, 5, 6

Denial of Appellant's Request for Witness Brannin.

Denial of Examination of Witness "Jim."

Denial of Examination of Prosecuting Attorney.

Witness Miss Brannin was the public stenographer who typed the statement of appellant and, as stated on page 148 of the Transcript of Testimony, the statement was a repetition of his testimony. This statement was sent up on this appeal although it was only marked for identification.

Witness "Jim" was the jailor where appellant was

confined after his arrest and was only wanted as a witness to show that he took $1.60 to pay for sending a telegram which was admitted in evidence. (Tr. T. 75).

The denial of appellant's right to examine the prosecuting attorney is specified as error. The record of this so-called denial appears on page 133, Transcript of Testimony and speaks for itself. The thousand one dollar bills were never in anyone's possession except the Reno Police and the Secret Service from the time of defendant's arrest until introduced in evidence as appears from the trial record.

The contention by appellant that the three denials of witnesses are errors is not grounded on reason. There was nothing that either could testify to that would assist the court or jury in properly deciding the issues involved. There was no denial of appellant's rights in either instance.

7 and 8

Prejudicial Misconduct of Prosecuting Attorney. Allowing References to Gun to Stand.

Appellant's Specification of Errors Nos. 7 and 8 cover the prosecuting attorney's reference to a scheme on the part of defendant and the various references to the gun. The reference to the scheme on the part of the defendant was part of the government's case. In addition to the charge of violating Sec. 265, T. 18, U. S. C. A., he could have been charged with violation of Sec. 264, T. 18, U. S. C. A. for having in his possession a plate with intent to use the same in counterfeiting and the new bills which defendant had in his possession would be required for

such counterfeiting after bleaching in the collotype system of counterfeiting. The two offenses under Sections 265 and 264, T. 18, U. S. C. A., are so related that we contend it was entirely proper to show the scheme of the defendant in order to prove the intent to defraud and knowledge on his part. In *United States* v. *Fawcett,* 115 F. (2d) 768 (8-9), the court stated:

> "It is a general rule of law that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner; *Shaffner* v. *Commonwealth,* 72 Pa. 60, 13 Am. Rep. 649; *Boyd* v. *United States,* 142 U. S. 450, 12 S.Ct. 292, 35 L.Ed. 1077. However, there are certain exceptions which allow the proof of other offenses in order to establish the intent or motive of the defendant if one or more of these elements must be proved in order that the guilt of the defendant may be established. The offense here charged is one in which intent and knowledge are requisite elements of proof, and accordingly the conduct of the defendant at or near the time charged in the indictment is admissible. The intention of a person charged with a crime can hardly ever be shown by direct evidence and for this reason it is permissible to introduce evidence of other acts of a similar nature; *Withaup* v. *United States,* 8 Cir., 127 F. 530; *Olson* v. *United States,* 8 Cir., 133 F. 849; *Colt* v. *United States,* 8 Cir., 190 F. 305; *Samuels* v. *United States,* 8 Cir., 232 F. 536, Ann. Cas. 1917A, 711. Here the act shown by the testimony complained of was connected with the offense charged in the indictment in that there was testimony by the government agent that the counterfeit ten dollar note given to Tierney was made from the same plates from which the counterfeit notes, G-1-G-8, were made. The intent as to other offenses was clearly interwoven in the offense charged and the evidence was admissible. *Parker* v. *United States,* 2 Cir., 203 F. 950."

The references to the gun where allowed to stand were not improper. The defendant had the gun unlawfully in his possession and was arrested because of his attempt to exchange it for a higher caliber automatic revolver. His possession of a gun, the split notes and the new bills are not too unrelated as to be considered in arriving at the knowledge and intent to defraud required to be proven. The appellant in his own cross examination of Mr. Harding (Tr. T. 15-22) made repeated references to the gun and this should preclude him from raising objections to the conduct of his own case. The trial court's Instruction No. 18 (T. R. 41-42) and the court's ruling (Tr. T. 13) adequately protected the rights of the appellant.

It is a well-established principle that a party to a criminal proceeding cannot assume inconsistent positions in the trial and appellate courts. An appellant will not be permitted to allege errors in proceedings in the trial court in which he himself acquiesced or which were committed or invited by him or was the natural consequence of his own actions. Thus a party may be estopped to complain of a judgment for insufficiency of evidence where on the trial he supplied the deficiency by his own evidence or where he admitted the existence of facts which might otherwise have been proved. 24 Corpus Juris Secundum 693, paragraph 1842, with the many cases cited thereunder.

In the matter of the scheme above referred to on the part of the defendant concerning the collotype system of counterfeiting, the court's attention is called to the testi-

mony of Witness Walter Fisk (Tr. T. 88) describing this system, in which he states, on the last line of said page, that the plates (Exs. 1 and 2) are such plates as used in this system of counterfeiting, and on page 89, Transcript of Testimony, the same witness, in contradicting the contention of appellant, states that no photographic equipment is required in this process and only a small hand press is required or an old-fashioned washing wringer.

9

Admission of Mr. Eliason's Answer That Conversation With Appellant Took Place in the "Los Angeles County Jail."

There was no error, we contend, in the statement by Secret Service Agent Eliason that he interviewed the appellant in the Los Angeles County Jail. This was part of a proper foundation of the conversation the witness had with the appellant in establishing the time, place and circumstances under which the conversation took place. The appellant, in this Specification of Error, as in others, has failed to set forth any reason in support of the contention that this was error and that the rights of the defendant were prejudiced.

Where nothing more than the assignment of error is set out in the Brief it must be regarded as waived, *Wege* v. *Safe Cabinet Co.,* 249 F. 697; *H. E. Winterton Gum Co.* v. *Autosales Gum and Chocolate Co.,* 211 F. 612.

Admission of Irrelevant Testimony on Part of Appellant.

This contention deals entirely with appellant's testimony, and in support of this alleged error argues that it was fantastic and prejudicial to him before the jury. We cannot disagree that it was fantastic, but it was his defense, and error would have been committed if he were denied the right to defend himself in his own manner. He was granted more freedom by the court and the prosecuting attorney in presenting his case, as the record shows, because he acted without counsel. It is well-established law that a defendant cannot complain of errors favorable to himself. 24 Corpus Juris Secundum 1065, paragraph 1932. We do not concede, however, that the greater latitude extended him was error.

We believe if defendant had been represented by counsel much of his confusing testimony and evidence would have been eliminated. This reference is to all assignments of error. Although no error has been assigned or specified that defendant was not represented by counsel during the trial or the various proceedings before or after trial except in the matter of this appeal, the record is replete with advice and efforts by the presiding United States District Court Judge to have counsel assigned (T. R. 48-51) (Tr. T. 1, 2). In addition to the foregoing the trial court did, on September 17, 1947, appoint Mr. Robert Adams, an able and experienced member of the Nevada Bar, to represent the defendant, but on September 19, 1947, permitted Mr. Adams to withdraw as counsel

because defendant desired to proceed without counsel. The Clerk of the United States District Court of Nevada has supplemented the Trial Record to cover the said appointment and withdrawal of counsel.

11

No Instruction Was Given by the Court Defining "Intent to Defraud."

The "intent to defraud" is a comprehensive term as stated by the trial court. It is a term of such common knowledge to the average person required to serve on juries that further instruction was unnecessary. To require a specific definition of manner or effect of the defrauding would require also the name of the person, body politic, etc., to be named. In *Bachrack* v. *United States,* 75 F. (2d) 824, the court stated: "The statute (18 U. S. C. A. 265) uses the comprehensive term 'with intent to defraud' for the very purpose of making it immaterial whether the offender intended to defraud the government or some particular individual. One engaged in counterfeiting and kindred crimes may not, and probably does not usually, know who may be the victim of his fraudulent scheme; his real intention is that the forged instrument 'shall be accepted as genuine'."

We submit that the instructions generally, and particularly Instructions Nos. 9 and 12, adequately guided the jury in this connection.

15

12

The Court Gave No Instruction Relative to Finding Intent to Pass, Publish, Utter or Sell, Even Though Such Intent Was a Necessary Element in the Proof of the Crime, as Charged.

The information in each count is identical except the reference in count one refers to the $50.00 note and count two refers to the $20.00 note. Both charge that defendant "did unlawfully, with intent to defraud, and with intent to pass, publish, utter or sell, have or keep in his possession . . .". The intent to pass, publish, utter or sell is mere surplusage and, as it was unnecessary to sustain the violation, no instruction was necessary. In *Smith* v. *United States,* 74 F. (2d) 941, the Fifth Circuit Court of Appeals sustained a conviction based upon an indictment charging only "intent to defraud." The trial court's Instruction No. 12 (T. R. 37) correctly stated the law and there was no error committed by the omission of an instruction to pass, publish, utter or sell the said notes.

13

The Court's Instruction No. 6 Was Prejudicial.

The objection to the trial court's Instruction No. 6 (T. R. 34) is wholly without merit. Were this instruction standing alone it protects the rights of the accused in an adequate manner. This instruction considered with Instruction No. 5 (T. R. 33) in particular and all the instructions would warrant only the conclusion that the rights of the accused were fully protected in a manner

consistent with the conditions encountered in the trial by his appearing without counsel.

The fact that appellant refused assistance of counsel was a compelling reason for the trial court and the prosecuting attorney to exercise greater caution and consideration in their respective duties as the record shows.

CONCLUSION

The appellant alleges thirteen errors. No objections were raised before, during or after the trial prior to this appeal. It is apparent that the appellant was not so disappointed with his conviction but rather with his sentence. Attention is called to his statement at the time of imposition of sentence (T. R. 53-4) when he stated, "Well, Judge, your Honor, I had a 100 per cent fair trial, there is nothing wrong with the trial at all. Of course, I disagree with the jury, but I had a 100 per cent trial."

We respectfully submit that there is no error, either assigned or argued by appellant or apparent in the record, to warrant a reversal of the judgment appealed from, and urge its affirmance.

DATED June 10, 1948.

Miles N. Pike
United States Attorney

Bruce R. Thompson
Assistant United States Attorney

Wm. J. Kane
Assistant United States Attorney

Federal Building

Reno, Nevada

Attorneys for Appellee